Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OSCAR DIAZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR CERTIORARI REVIEW

On Petition for Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the language in this Court's opinion in ***Apprendi v. New Jersey,*** 530 U.S. 466 (2000) providing that "any fact [other than a prior conviction] that increases the penalty for a crime beyond the *prescribed statutory maximum*" refers to the maximum sentence prescribed under the United States Sentencing Guidelines, because as this Court explained in ***United States v. R.L.C.,*** 503 U.S. 291 (1992), the Sentencing Guidelines are statutes?

II. Whether the Eleventh Circuit's opinion in the instant case regarding the enhancement of the Petitioner's sentence based upon the quantity of cocaine involved in the conspiracy, violated this Court's holding in ***Apprendi v. New Jersey,*** 530 U.S. 466 (2000) and/or ***Jones v. United States,*** 526 U.S. 277 (1999), where:
(A) the offenses charged in the Indictment did not charge *Diaz* with an offense involving five (5) kilograms or more of cocaine in violation of 21 U.S.C. § 841,
(B) the trial court did not instruct the jury to determine the quantity of cocaine, and
(C) *Oscar Diaz'* sentence was enhanced from a minimum of ten (10) years to twenty (20) years based upon the trial court's factual finding that the quantity of drugs attributable to *Diaz* was five (5) kilograms or more, pursuant to 21 U.S.C. § 841(b)(1)(A), even through that statute was not charged in the Indictment?

III. Whether an Indictment that does not allege the

minimum quantity of drugs required under the charging statute, fails to set forth an essential element of an offense, and/or violates the Fifth Amendment Due Process rights and Sixth Amendment guarantees of notice and jury trial by providing that a defendant's maximum punishment after application of the United States Sentencing Guidelines, may be increased from 10 years to 20 years based solely upon a finding by a sentencing judge under a preponderance of the evidence standard, without notice by indictment and jury trial, that the defendant had the requisite intent necessary to establish a that he conspired to possess with intent to distribute or possessed with intent to distribute five (5) kilograms of more of cocaine?

IV. Whether an Indictment that does not allege the minimum quantity of drugs required under the charging statute, fails to set forth an essential element of an offense, and/or violates the Fifth Amendment Due Process rights and Sixth Amendment guarantees of notice and jury trial by providing that a defendant's minimum punishment under the penalty provisions of the charging statute, may be increased from a range of zero to 20 years to a range of 20 years to life imprisonment, based solely upon a finding by a sentencing judge under a preponderance of the evidence standard, without notice by indictment and jury trial, that the defendant, who has a prior felony drug conviction, had the requisite intent necessary to establish a that he conspired to possess with intent to distribute or possessed with intent to distribute five (5) kilograms of more of cocaine?

V. Whether a trial court must sentence a defendant whose drug conviction violates ***Apprendi v. New Jersey***, 530 U.S. 466 (2000) and/or ***Jones v. United States***, 526 U.S. 277 (1999), to an offense level under the United States Sentencing Guidelines that is the lowest possible level for the drug specified in the indictment and charging statute?

VI. Whether the proper standard of review is *per se* reversible error where an Indictment that fails to set forth an essential element of an offense, and/or violates the Fifth Amendment Due Process rights and Sixth Amendment guarantees of notice and jury trial?

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The unreported opinion of the Eleventh Circuit was entered on January 11, 2001. (Pet. App. 17-37). The Eleventh Circuit's unpublished order entitled "On Petition(s) for Rehearing and Suggestion(s) for Rehearing En Banc," was entered on February 27, 2001 (Pet. App. 62), and the Eleventh Circuit's Mandate issued on March 14, 2001.

The appeal to the Eleventh Circuit arose from the Petitioner's Judgment and Commitment entered on November 5, 1999, after a jury trial. (Pet. App. at 4-16).

JURISDICTION

The Judgment of the United States Court of Appeals for the Eleventh Circuit was entered on January 11, 2001. A timely Petition for Rehearing *En Banc*, was filed on February 1, 2001, and on February 27, 2001, the Eleventh Circuit entered an order denying the Petition for Rehearing *En Banc*. (Pet. App. at 58). Thereafter, on March 14, 2001 the Eleventh Circuit issued a Mandate on its Judgment.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is conferred under Title 28 U.S.C. § 1254(1) and Sup.Ct. Rule 10.

CONSTITUTIONAL PROVISIONS & STATUTES

U. S. Const., amend V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;

nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Const. amend VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

21 U.S.C. § 841(a) - Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

21 U.S.C. § 841(b) - Penalties - (Excerpt)[1]

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving--

* * *

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[1] The excerpts include penalties for cocaine only.

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

* * *

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior

convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving--

* * *

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

* * *

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years

and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, . . . except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is

other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

21 U.S.C. § 846 - Attempt and Conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

U.S.S.G. § 2D1.1 (Excerpt)[2]

§ 2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy.

(a) Base Offense Level (Apply the greatest):

(1) 43, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(2) 38, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

(2) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by 2 levels. If the resulting offense level is less than level 26, increase to level 26.

(3) If the object of the offense was the distribution of

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[2] The excerpts include penalties for cocaine, but not cocaine base.

a controlled substance in a prison, correctional facility, or detention facility, increase by 2 levels.

(4) If (A) the offense involved the importation of methamphetamine or the manufacture of methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under § 3B1.2 (Mitigating Role), increase by 2 levels.

(5) If the offense involved (A) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance, or (B) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.

(6) If the defendant meets the criteria set forth in subdivisions (1) to (5) of § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) and the offense level determined above is level 26 or greater, decrease by 2 levels.

(c) DRUG QUANTITY TABLE

	Controlled Substances and Quantity	**Base Offense Level**
1	* * * •150 KG or more of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	Level 38
2	* * * •At least 50 KG but less than 150 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	Level 36

	Controlled Substances and Quantity	Base Offense Level
3	* * * •At least 15 KG but less than 50 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	Level 34
4	* * * •At least 5 KG but less than 15 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	Level 32
5	* * * •At least 3.5 KG but less than 5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	Level 30
6	* * * •At least 2 KG but less than 3.5 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	Level 28
7	* * * •At least 500 G but less than 2 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	Level 26
8	* * * •At least 400 G but less than 500 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	Level 24

	Controlled Substances and Quantity	Base Offense Level
9	* * * •At least 300 G but less than 400 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	Level 22
11	* * * •At least 100 G but less than 200 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	Level 18
12	* * * •At least 50 G but less than 100 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	Level 16
13	* * * •At least 25 G but less than 50 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	Level 14
14	* * * •Less than 25 G Cocaine (or the equivalent amount of other Schedule I or II Stimulants); * * *	Level 12

IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

OSCAR DIAZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Oscar Diaz, Defendant and Appellant in the courts below, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeal for the Eleventh Circuit entered in this case on January 11, 2001, and Order entered on February 27, 2001, denying his Petition for Rehearing and Suggestion for Rehearing *En Banc*. Said Petition specifically requested a rehearing as to the quantity of drugs attributed to *Diaz* in light of this Court's opinions in ***Apprendi v. New Jersey,*** 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and/or ***Jones v. United States,*** 526 U.S. 277, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999). (See, Pet. App. at 38-61).

STATEMENT OF THE CASE

A. *Proceedings in the Courts Below:*

The indictment upon which Petitioner *Diaz* was tried alleged in Count I that the defendants conspired to possess

with intent to distribute a "detectable amount of cocaine" in violation of 21 U.S.C. § 846. Similarly, Count II charged possession with intent to distribute a "detectable amount of cocaine" in violation of Title 21 U.S.C. § 841(a)(1) and Title 18 U.S.C. § 2. (R1-22). Neither count specified a minimum quantity of drugs, nor did the minimum quantity of drugs necessary to apply the enhanced penalty provisions of 21 U.S.C. § 841(b).[3]

After deliberating for five and one-half (5 ½) hours, the jury convicted *Diaz* of Counts I and II. (R8-311,317-318).

At sentencing, *Oscar Diaz* vigorously objected to the quantity of cocaine, and requested a downward departure for minor role and from the career criminal enhancement. (R1-115, 117). The PSR attributed a total of 14,043 grams of cocaine to *Diaz* by arguing that the cocaine was in "plain view" or was otherwise foreseeable. *Diaz* argued that the cocaine was not in plain view, and the evidence failed to show that he had constructive possession of the cocaine, because the evidence did not show that: (1) *Oscar Diaz* observed or knew that the duffle bag that defendant Chavarry picked up during the five (5) minutes that Chavarry was in apartment 209 contained any cocaine, (2) *Oscar Diaz* entered the hallway or master bathroom of apartment 209, or observed or knew that either bathroom had cocaine secreted in the walls; (3) *Oscar Diaz* observed any cocaine inside the apartment,[4] and/or (4) the apartment was an obvious stash house. (R1-115).

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[3] The Indictment also contained a forfeiture provision pursuant to Title 21 U.S.C. § 853, which only itemized $52,000 seized from co-defendant Rafael Chavarry, Jr. (R1-22-2).

[4] Based upon the lower purity of the cocaine on the kitchen counter, a properly instructed jury could have found that Diaz only conspired and intended to possess or attempt to possess with the intent to distribute the cut cocaine.

However, for the purposes of sentencing, *Diaz* argued that the most that the Government could argue that he could have observed was the 994.1 grams 45% pure cocaine located on the kitchen counter - - which was approximately *half* the purity of all the other cocaine found in the bathrooms or duffle bag. (R1-114,115; R6-103-4,114-15, 137; R11-80-89).

After denying all of *Oscar Diaz'* objections except as to the fine, the District Court sentenced *Diaz* to a 20 year mandatory minimum term of imprisonment, followed by a term of 10 years supervised release. (R2-160).

Without oral argument, the court of appeals affirmed *Diaz's* conviction and sentence, and denied his Petition for Rehearing and Suggestion for Rehearing *En Banc*, in which *Diaz* urged the Eleventh Circuit to apply this Court's ruling in ***Apprendi*** to the trial court's findings regarding the quantity of cocaine attributable to *Diaz*. (Pet. App. at 17-37,62).

B. *Statement of Facts:*

On April 15, 1999, an officer surveilled a residence that was "part of an ongoing investigation," and observed a dark colored Toyota Tercel parked outside. (R6-9,11). After surveilling the residence for approximately four and one-half hours, the officer observed *Oscar Diaz* exit the residence alone, with nothing in his hands, enter the Toyota and drive off to another unspecified residence where he exited empty handed, and entered for approximately ten minutes. *Diaz* then exited the residence - empty handed, and drove off in the Toyota. (R6-11-13).

The officer next surveilled *Diaz* drive to Rafael Morales' house (his cousin). (R6-13-14,42). When *Diaz* arrived, several individuals were standing outside of the Morales residence. *Diaz* exited the Toyota - again empty handed, and walked over and talked for a couple of minutes to Morales and Rafael Barreto. (R6-14). No officer or other witness overheard the conversation. (R6-15,44-45).

Thereafter, *Diaz* reentered the Toyota and backed out of the driveway. (R6-14). In the meantime, Morales and Barreto entered a black Acura, backed out, and followed *Diaz's* vehicle to a shopping plaza in Miami, where he parked and left it. (R6-15). After arriving at the shopping plaza, *Diaz* exited the Toyota and walked toward the Acura. While *Diaz* walked toward the Acura, Morales and Barreto exited and walked toward two pay phones at the shopping center with *Diaz* accompanying them. (R6-15-16). No officer or other witness overheard any conversations, or observed anyone making phone calls. (R6-44-45).

Minutes later, *Diaz* walked alone over to a bakery. (R6-16,44). While *Diaz* was at the bakery, Morales and Barreto conversed. (R6-44-45). *Diaz* later exited the bakery carrying a white paper bag and a coffee cup, and joined Morales and Barreto. (R6-44-45). *Diaz* then used the pay phone while Morales sat on the curb, however, no evidence showed who *Diaz* called or what was discussed. (R6-15-16,44-45).

After approximately twenty minutes, Morales looked down at his belt buckle, removed his "pager" and showed it to *Diaz*. (R6-17-18,46). However, no pager was ever seized from Morales and no evidence showed that the one beeper that was later found in the Fountainbleau apartment belonged to or was used by Morales, or received a call from anyone that day. (R6-17-18,185-86). During the 20 minute period before Morales allegedly received a beeper call, Morales, *Diaz*, and Barreto "were just talking amongst each other, laughing, having conversations," (R6-17), and none of the men engaged in any counter-surveillance activities. (R6-15-18).

Morales, *Diaz* and Barreto then went over to the pay phones and Morales, *not Diaz*, placed a phone call. Again, no evidence showed who Morales called or the content of the conversation. (R6-17-18).

Thereafter, Morales, *Diaz* and Barreto walked to and entered the Acura with Morales driving, Barreto in the front passenger's seat, and *Diaz* in the back seat. (R6-18-19). Morales drove the Acura back to his residence, stopped for a

few minutes, and then drove to a Winn Dixie grocery store. (R6-64-65,91-92). Upon entering the parking lot, Morales drove up and down the aisles, and then stopped for several minutes next to a white Chevrolet Blazer. (R6-66-67). While stopped by the Blazer, Morales appeared to engage in a conversation with Rafael Charvarry. (R6-65-67,92-94). However, no officer or other witness overheard the conversation. (R6-66-67).

Charvarry then followed Morales to an apartment complex. (R6-67-68,95). Morales, *Diaz* and Barreto exited the Acura and walked toward an archway at the entrance of the building - empty handed. (R68-71,108). Upon reaching the archway, one of the three individuals motioned for Chavarry to come over to the archway. *Id.* However, no evidence showed that *Diaz* motioned for Charvarry. (*Id.*, R6-81-82).

The four individuals walked upstairs and entered apartment 209. (R6-99-100). Approximately five (5) minutes after Chavarry entered the apartment, Chavarry exited the apartment complex carrying a black bag over his shoulder and a "small pinkish, bluish, flowered, printed small bag that was wrapped up in his hand." (R6-71-72, 117; Govt. Ex 7-8). After Chavarry walked to the Chevy Blazer, an officer approached, questioned Chavarry, and subsequently found seven kilo size packages of suspect cocaine in the black bag.[5] (R6-45-46,73-78).

Upon learning that kilograms of suspect cocaine were seized, officers went upstairs to the apartment and observed Barreto exit, empty handed. (R6-26-29,49). Upon searching Barreto, the officers found no drugs or money. (R6-37). The apartment door then slammed and locked, and an officer heard someone yelling "police." (R6-28-29, 51,102-03). An officer at the back of the apartment observed *Diaz* jumping from a second floor balcony, and Morales with one leg over the balcony. (R6-123-36). The officers then chased, caught, and hand-cuffed *Diaz*. (R6-32-33). Upon searching *Diaz*, the

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[5] The bag contained 4,994 grams. (R6-77-78).

officers found no money, drugs, beepers or cell phones. (R6-37). Further, the officers never swabbed *Diaz* 'hands, nor were his clothes checked to determine if he had any cocaine residue on them, (R6-85-86,116), and none of the evidence was fingerprinted to determine if *Diaz'* prints appeared thereon. (R6-116).

During a security sweep of the apartment, no guns, money, or drug ledgers were found. (R6-103-04, 200-01). The first officer inside the apartment, Morgan, did not testify where he observed any of the cocaine, (R6-229-30), and by the time Agent Collins entered to take the evidence in custody, the items on the kitchen counter were already seized by other individuals. (R6-184-85,197-98).

Although the majority of the cocaine was seized from the two bathrooms, the photographs showed that neither the hallway or master bathroom were visible from the living room. *Govt. Ex. 5-6, 8-9, Def. Sent. Ex. 1-2,5.* Further, the lack of lighting in the master bedroom when the first photographs were taken showed that neither *Diaz* nor anyone else entered the master bedroom or bathroom during the five minutes that *Diaz* was in the apartment. *Compare, Govt Ex. 8 with 9, and Def. Sent. Ex. 5 with 7.*

Moreover, one of the officers testified that the cocaine in the bathrooms was not in plain view. Detective Recio testified that he never saw the cocaine - even though at the time he entered the apartment, he knew that cocaine had been located in the bathroom, and peeked into the bathroom without looking down inside the wall. Specifically, during cross-examination, Detective Recio testified:

Q. Okay. ***Well, when you testified on direct examination, did you say that the cocaine wasn't visible at the time in the bathroom when you looked in there?***

A. When I looked in it –

Q. Wait a minute. Answer my question.

A. Okay.

Q. ***Did you say on direct examination, when you***

peeked in the bathrooms, you couldn't see the cocaine like it is in the picture? Did you say that?

A. ***Yes, I did say that.***

Q. Okay. Now, the cocaine as depicted in the walls are different than when you saw it, correct?

A. No, sir.

Q. What's different? It's not different?

A. The pictures below there, sir, where the cocaine is on there, that's what I was referring to.

Q. Oh, okay.

A. ***That those cocaine kilograms like that on the sink were not like that when I looked through.***

Q. ***Gotcha.***

A. Okay.

Q. ***So, in other words, this picture was after someone took cocaine out of the wall, placed it on there and then took a photograph.***

A. ***Yes, sir.***

Q. ***Gotcha. And when you peeked in there, you said you really couldn't see the cocaine.***

A. ***No, sir.***

Q. ***Am I correct?***

A. ***Yes, sir.***

Q. Now, you already knew there was cocaine found in there, correct?

A. Yes.

Q. You were already expecting to see cocaine in the bathroom, were you not?

A. Yes.

Q. When you went there to peek in?

A. ***Yes. I was looking around.***

Q. ***And you still couldn't see it so well in the wall, could you?***

A. ***No.***

Q. In fact, you had to walk in and look down into the wall to actually see the cocaine.

A. I couldn't answer that because I didn't do it, sir.
Q. But you didn't do that.
A. No, sir.
Q. But going to the doorway of the bathroom you couldn't see the cocaine in the wall.
A. No.

(R6-224-25). (Emphasis added).

Even when the Government attempted to rehabilitate Detective Recio on redirect examination, Recio maintained that he could not see the kilograms in the bathrooms:

Q. When you saw the cocaine in the apartment, it looked like this (indicating)? I'm pointing at -- it was placed the way it is in 5-E?
A. No, sir.
Q. Which way was it placed?
A. ***No. What I said was that when I looked into the bathroom the cocaine was not on there like this.***
Q. ***How did it look when you were in the bathroom?***
A. ***I didn't see it like that.***
Q. Can you just describe the way it looked?
A. It was -- well, ***I didn't see it. I didn't see the cocaine.***

(R6-226-27). (Emphasis added).

As a result, the cocaine in the bathrooms clearly was not in plain view to anyone unless they (1) walked down the hall, (2) walked into the bathroom, *and* (3) looked down into the wall where a medicine cabinet would be hung.

Similarly, no testimony or evidence showed that *Oscar Diaz* saw the contents of the duffle bag that Chavarry placed in the Chevy Blazer, that the duffle bag was handed to Chavarry while *Oscar Diaz* was inside the apartment, or that the duffle bag came from inside the apartment. Moreover, no testimony or evidence indicated that *Diaz* discussed any numbers or quantities of monies, drugs or other objects, touched any of the cocaine, packaging, paraphernalia or

money, had any cocaine residue on him, had any money that would indicate that he had been just involved or would be involved in any cocaine trafficking offenses, or that his fingerprints were present anywhere in the apartment where any cocaine was stored. (R6-188-89,193-98).

ARGUMENT I

THE LANGUAGE IN THIS COURT'S OPINION IN *APPRENDI V. NEW JERSEY*, 530 U.S. 466 (2000) PROVIDING THAT "ANY FACT [OTHER THAN A PRIOR CONVICTION] THAT INCREASES THE PENALTY FOR A CRIME BEYOND THE *PRESCRIBED STATUTORY MAXIMUM*" REFERS TO THE MAXIMUM SENTENCE PRESCRIBED UNDER THE UNITED STATES SENTENCING GUIDELINES, BECAUSE AS THIS COURT EXPLAINED IN *UNITED STATES V. R.L.C.*, 503 U.S. 291 (1992), THE SENTENCING GUIDELINES ARE STATUTES.

A. The U.S. Sentencing Guidelines Are Statutes and a Defendant's Sentence May Not Exceed the Lowest Maximum Sentence after Application of the Guidelines and Limitations on Sentences Set Forth in the Charging Statutes:

The United States Sentencing Guidelines are clearly a creature of statute that impose upper and lower limits on a sentencing court. This Court has previously rejected the Government's attempt to argue that an "authorized" sentence only refers to the penalty provisions in the charging statute, rather than the limitations imposed through the Sentencing Guidelines in ***United States v. R.L.C.,*** 503 U.S. 291, 112 S.Ct. 1329, 117 L.Ed.2d 559 (1992). In ***R.L.C.*** this Court held that the penalty provisions of the charging statute setting forth the maximum possible penalty are not to be given primacy over the maximum possible penalty permissible under the

Sentencing Guidelines. ***R.L.C.***, 503 U.S., at 298, 112 S.Ct., at 1334.

The district court in ***R.L.C.*** found that R.L.C., a juvenile, committed an act of juvenile delinquency within the meaning of 18 U.S.C. § 5031, because his acts would have been the crime of involuntary manslaughter in violation of 18 U.S.C. §§ 1112(a) and 1153 if committed by an adult. The maximum sentence for involuntary manslaughter under 18 U.S.C. § 1112(b) was three years. At R.L.C.'s dispositional hearing, the district court granted the Government's request to impose the maximum penalty for respondent's delinquency and accordingly committed him to official detention for three years.

Despite the manslaughter statute's provision for an adult sentence of that length, the United States Court of Appeals for the Eighth Circuit, vacated R.L.C.'s sentence and remanded for resentencing, after concluding that 36 months exceeded the cap imposed by 18 U.S.C. § 5037(c)(1)(B) upon the period of detention to which a juvenile delinquent may be sentenced. 915 F.2d 320 (1990).

The government filed a petition for certiorari review to the Supreme Court, arguing -- as the Government has in most post-***Apprendi*** cases -- that the maximum penalty authorized under the statute refers to the charging statute; not the maximum under the Sentencing Guidelines. This Court rejected the Government's argument as follows:

> The Government suggests a straightforward enquiry into plain meaning to explain what is "authorized." It argues that the word "authorized" must mean the maximum term of imprisonment provided for by the statute defining the offense, since only Congress can "authorize" a term of imprisonment in

punishment for a crime. As against the position that the Sentencing Guidelines now circumscribe a trial court's authority, the Government insists that our concern must be with the affirmative authority for imposing a sentence, which necessarily stems from statutory law. It maintains that in any event the Sentencing Commission's congressional authorization to establish sentencing guidelines does not create affirmative authority to set punishments for crime, and that the Guidelines do not purport to authorize the punishments to which they relate.

But this is too easy. The answer to any suggestion that the statutory character of a specific penalty provision gives it primacy over administrative sentencing guidelines is that the mandate to apply the Guidelines is itself statutory. See 18 U.S.C. § 3553(b). More significantly, ***the Government's argument that "authorization" refers only to what is affirmatively provided by penal statutes, without reference to the Sentencing Guidelines to be applied under statutory mandate, seems to us to beg the question.*** Of course it is true that no penalty would be "authorized" without a statute providing specifically for the penal consequences of defined criminal activity. The question, however, is whether Congress intended the courts to treat the upper limit of such a penalty as "authorized" even when proper application of a statutorily mandated Guideline in an adult

> case would bar imposition up to the limit, and an unwarranted upward departure [503 U.S. 298] from the proper Guideline range would be reversible error. § 3742. Here it suffices to say that the Government's construction is by no means plain. ***The text is at least equally consistent with treating "authorized" to refer to the result of applying all statutes with a required bearing on the sentencing decision, including not only those that empower the court to sentence but those that limit the legitimacy of its exercise of that power.*** This, indeed, is arguably the more natural construction.

R.L.C., 503 U.S. 291,298, 112 S.Ct. 1329, 1334. ***Mistretta v. United States,*** 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989).[6]

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[6] While ***Apprendi*** itself concerned only the New Jersey hate crime statute, there are numerous suggestions in the majority, concurring, and dissenting opinions that the case's scope may be quite broad indeed. Justice Thomas's concurrence argued that any fact that alters the range of punishments to which a defendant is exposed must be found by a jury, *see id.* at 2379-80, acknowledging that his proposed rule might invalidate the Sentencing Guidelines themselves. *See id.* at 2380 n. 11. Justice Scalia's concurrence maintained that "all the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury." *Id.* at 2367. Justice O'Connor's dissent expressed concern that the Court's holding "will have the effect of invalidating significant sentencing reform accomplished over the past three decades." *Id.* at 2394. And Justice Breyer, a key figure in the development of the Sentencing Guidelines, lamented that "the rationale that underlies the Court's rule suggests a principle ... that, unless restricted, threatens the workability of every criminal justice system (if applied to judges) or threatens efforts to make those systems more uniform, hence more fair (if applied to [sentencing] commissions)." *Id.* at 2402.

As a result, this Court's holding in ***Apprendi,*** that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt," applies to the statutory maximums set forth in the United States Sentencing Guidelines if such are lower than the maximums set forth in the charging statute. 120 S.Ct. at 2362-63 (emphasis added).

Accordingly, the maximum possible sentence for the Petitioner under the Sentencing Guidelines would consist of a base offense level of 12 with a sentencing range of 15 to 21 months, as provided for a 25 gram level set forth in Section 2D1.1 of the United States Sentencing Guidelines.

B. Alternatively, where the Determination of an Essential Element of an Offense (Other than Recidivism) Removes the Discretion of the Sentencing Court by Requiring the Defendant to Receive a Mandatory Minimum Sentence, That Element must Be Determined by a Jury Beyond a Reasonable Doubt.

The majority responded to these allegations simply by noting that "[t]he Guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held. *See, e.g.,* ***Edwards v. United States***...." *Id.* [523 U.S. 511, 118 S.Ct. 1475] at 2366 n. 21. ***Edwards,*** the only case cited by the majority, was quoted for the proposition that "a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines." 523 U.S. 511, 515, 118 S.Ct. 1475, 140 L.Ed.2d 703 (1998). The Court did not cite ***Mistretta v. United States,*** 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989), the case that originally upheld the constitutionality of the Sentencing Guidelines, nor did it address the holding in ***R.L.C.,*** that the Sentencing Guidelines are a statute and that the statutory character of a specific penalty provision such as 21 U.S.C. § 841, does not give it primacy over administrative sentencing guidelines.

In the instant case, once the District Court determined by a preponderance of the evidence that over 5 kilograms of cocaine were attributable to *Oscar Diaz,* and that Mr. *Diaz* had one prior drug felony conviction, under 21 U.S.C. § 841(b)(1)(A), a 20 year sentence was *mandatory*, even though it was merely the maximum sentence applicable under 21 U.S.C. § 841(b)(1)(C) - where the minimum sentence is zero. Based upon a similar case, the Sixth Circuit recently vacated a defendant's sentence in ***United States v. Strayhorn***, - F.3d -, 2001 WL 536548 (6th Cir., May 22, 2001), because "[t]he judge's determination effectively limited the range of applicable penalties and deprived [the defendant] of the opportunity to receive a less than life imprisonment without the possibility of release." *Id., quoting* ***United States v. Flowal,*** 234 F.3d 932, 937 (6th Cir. 2000). ***Almendarez-Torres v. United States,*** 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998) does not proscribe the reasoning of ***Strayhorn,*** because ***Almendarez-Torres*** only concerned recidivism as a sentencing factor of Title 8 U.S.C. § 1326, and did not require the sentencing court to find any other fact, such as the quantity of drugs attributable to the defendant.

ARGUMENT II

BEFORE INCREASING A DEFENDANT'S STATUTORY MAXIMUM SENTENCE FROM FORTY YEARS TO LIFE IMPRISONMENT ON THE BASIS OF THE QUANTITY OF ILLEGAL DRUGS A DEFENDANT A CONSPIRED TO IMPORT IN A DRY CONSPIRACY, THE PROSECUTION MUST PROVE THE QUANTITY OF ILLEGAL DRUGS BEYOND A REASONABLE DOUBT TO A JURY.

A. Under The Due Process Clause Of The Fifth Amendment And The Notice And Jury Trial Guarantees Of The Sixth Amendment Any Fact (Other Than Recidivism), That Increases The Maximum Penalty For A Crime, Including The Quantity of Illegal Drugs That A Defendant Agreed to Import, Must Be Charged In An Indictment, Submitted To A Jury And Proven Beyond A Reasonable Doubt.

The Eleventh Circuit's affirmance of *Diaz's* conviction and sentence, and denial of his Petition for Rehearing and Rehearing *En Banc*, directly conflict with the decisions of this Court in ***Apprendi*** and ***Jones v. United States,*** 526 U.S. 277, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999). In ***Apprendi,*** this Court squarely held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.*, 120 S.Ct. at 2362-63.

After the Eleventh Circuit affirmed *Diaz's* conviction and sentence and denied his petition for rehearing and suggestion for rehearing *en banc*, this Court reversed and remanded numerous drug cases for reconsideration in light of ***Apprendi.***[7] See note 8 below. Like the cases this Court has

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[8] The following drug cases were reversed and remanded for further consideration in light of ***Apprendi: United States v. Humphrey,*** 210 F.3d 373 (6th Cir.2000)(unpublished)(trial court properly calculated of amount of cocaine), *rev'd,* 121 S.Ct. 478, - L.Ed.2d - (Nov.13, 2000); ***United States v. Whitt,*** 211 F.3d 1022 (7th Cir.2000)(sustained trial court's findings regarding quantities of drugs based upon witness testimony at trial), *rev'd,* - U.S. -, 121 S.Ct. 423, - L.Ed.2d - (Nov. 6, 2000); ***United States v. Hughes,*** 213 F.3d 323 (7th Cir. 2000)(same), *rev'd,* - U.S. -, 121 S.Ct. 423, - L.Ed.2d - (Nov. 6, 2000); ***United States***

reversed and remanded for further consideration, the indictment in this case failed to charge the threshold amount of cocaine necessary to support the enhanced penalty provisions of the charging statute, and the jury instructions and verdict form failed to direct the jury to make a factual finding beyond a reasonable doubt as to the quantity of drugs that *Diaz* possessed or conspired to. (R1-1,4,17; Ct. Ex. 1-3). Accordingly, at the minimum, this Court should reverse and remand this case for further consideration in light of ***Apprendi*** and ***Jones.***

However, this case also presents this Court with the following issues of national importance:

(a) As set forth in Argument I, whether the language in ***Apprendi*** *supra,* referring to the "prescribed statutory maximum," refers to the maximum sentence prescribed under the United States Sentencing Guidelines, because as this Court explained in ***United States v. R.L.C.,*** 503 U.S. 291 (1992), the Sentencing Guidelines are statutes?

(b) Whether ***Apprendi*** and/or ***Jones*** require the complete reversal of a conviction due to lack of jurisdiction? and,

(c) Assuming that this Court's holdings in ***Apprendi***, and/or ***Jones,*** only require a the trial court to

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v. Smith, 215 F.3d 1331 (7th Cir. 2000)(type and quantity of drugs sentencing factors), *rev'd,* - U.S. -, 121 S.Ct. 336, - L.Ed.2d - (Oct. 16, 2000); ***United States v. Hester,*** 199 F.3d 1287 (11th Cir.2000)(amount of marijuana involved not an element of offense that gov't had to prove beyond a reasonable doubt), *rev'd,* - U.S.-, 121 S.Ct 336, - L.Ed.2d - (Oct. 16, 2000); ***United States v. Jones,*** 194 F.3d 1178 (10th Cir. 1999)(a sentencing judge can consider quantities of drugs not charged in information or indictment or proven at trial when determining sentence, and quantities proven at trial do not dictate mandatory minimum), *rev'd,* - U.S. -, 120 S.Ct. 2739, 147 L.Ed.2d 1002 (2000).

resentence a defendant whose conviction was obtain in violation thereof, whether the trial court must resentence the defendant to an offense level under the United States Sentencing Guidelines that is the lowest possible level for the drug specified in the indictment and charging statute?

(1) The Quantity of Drugs That A Defendant Intended to Import Is An Essential Element of 21 U.S.C. §§ 841 and 846.

To comport with the Fifth and Sixth Amendments, a criminal indictment must (1) contain all of the elements of the offense so as to fairly inform the defendant of the charges against him, and (2) enable the defendant to plead double jeopardy in defense of future prosecutions for the same offense. In ***Jones v. United States,*** 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), this Court noted that:

> under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.

Id., at 243, n. 6, 119 S.Ct. 1215.

The federal carjacking statute examined in ***Jones,*** set forth a choice of three maximum penalties, two of which were dependent on proof of facts that did not need to be present in the indictment or decided by the jury. 526 U.S. at 229, 119 S.Ct. 1215. The basic statute provided a fine or imprisonment of not more than 15 years for the offense of carjacking, 18 U.S.C. § 2119(1), but if serious bodily injury resulted, the maximum time in prison was 25 years, § 2119(2), and if death resulted, the maximum was life imprisonment, § 2119(3).

Similarly, in the instant case, Title 21 U.S.C. § 841,

requires a factual finding to determine if the violation of the applicable statute set forth in subsection (a) involved 5 kilograms or more of cocaine under subsection (b)(1)(A), or over 500 grams but less than 5 kilograms of cocaine under subsection (b)(1)(B).

Furthermore, like the indictment in Jones's case, which made no reference to the subsections of the statute, nor did it charge either that the defendant had inflicted serious bodily injury on the victim or death, the indictment herein wholly fails to identify the penalty provisions imposed after trial. *Diaz's* Indictment not only failed to identify which portion of section 841(b) the government sought to impose, it failed to cite to section 841(b) altogether, and further failed to state any specific quantity of cocaine that *Diaz* possessed or conspired to possess. (R1-22).

The lower courts in ***Jones*** held that the additional facts that triggered § 2119(2) and (3) were nonetheless sentencing factors, but the Supreme Court reversed, holding that the Fifth Amendment Due Process Clause of the Fifth Amendment and Sixth Amendment notice and jury trial require any fact other than a prior conviction that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.*, at 243, n. 6, 119 S.Ct. 1215. *Id.* at 249, 119 S.Ct. 1215.

(2) The failure of an Indictment to Charge an Essential Element of and Offense, Requires Reversal of a Conviction.

The requirement that an indictment contain all the elements of the offense provides a defendant with notice and protection from double jeopardy. See Const. Amd V ("nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb"); Const. Amd. VI ("the accused shall enjoy the right ... to be informed of the nature and cause

of the accusation"). An indictment also "limit[s] [the defendant's] jeopardy to the offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." ***Stirone v. United States,*** 361 U.S. 212, 218, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960). Furthermore, the Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." ***In re Winship,*** 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

The Second Circuit examined this issue in the context of the federal firearm statute where the defendants plead guilty to the simple firearms offense, but were enhanced one conviction for discharge of a firearm and imposed a 10 year consecutive sentence for violation of § 924(c) in connection with a different bank robbery. Instead of merely reversing for resentencing, the court remanded for resentencing or reindictment. ***United States v. Tran,*** 234 F.3d 798 (2d Cir., 2000). The indictments in ***Tran*** charged the defendants with a simple § 924(c) firearms offense, to which the defendants plead guilty. *Id.* at 803. Recognizing that the notion that an indictment is a prerequisite to jurisdiction over a criminal case in the federal courts is long established, the Second Circuit held that the district court acted outside its jurisdiction in sentencing the defendants for the enhanced firearms offenses not charged in their indictments. ***Tran,*** at 805-807, *citing,* ***Ex parte Bain,*** 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887)(indictment found by a grand jury indispensable to the power of the court to try defendant for crime charged).

Similarly, the indictment the grand jury returned against *Diaz* in the instant case, failed to set forth any notice that the enhanced penalty provisions of § 841(b) by either citing to the statute or specifying the quantity of cocaine that

the grand jury found that *Diaz* possessed or conspired to possess. Accordingly, the district court was without jurisdiction to try or sentence *Diaz*, because the grand jury did not charge *Diaz* with an essential element of the offense charged.

However, some Circuit courts have required defendants to either satisfy a plain error standard, or a harmless error standard after passing a stringent test to prove that a constitutional objection was raised. *See,* ***United States v. Candelario,*** 240 F.3d 1300 (11th Cir.2001), *pet. cert. filed,* (May 4, 2001)(No.00-9956). Such conflicts with the Fifth and Sixth Amendments to the U.S. Constitution. See Argument II(A)(1), *supra.*

B. Alternatively, Where a Defendant's Drug Conviction Violates *Apprendi* or *Jones,* The Defendant Should Be Resentenced To The Lowest Level Under The United States Sentencing Guidelines For The Drug Specified in the Indictment and Charging Statute.

As set forth in the points above, in instances such as the instant case where the Indictment fails to allege the penalty provision which would provide the trial court with jurisdiction to impose a minimum mandatory sentence or the quantity of drugs specified in said statute, then the trial court is without jurisdiction to sentence (as well as convict), the defendant.

In the event this Court does not rule that the indictment must be dismissed, the Petitioner submits that inasmuch as the petit jury found him guilty of a cocaine conspiracy for an unstated quantity of cocaine, that the trial court would only have authority to sentence him to the lowest quantity of cocaine specified in the United States Sentencing Guidelines.

Accordingly, *Diaz* submits that the highest base offense level applicable, would be a level 12.

CONCLUSION

For all the foregoing reasons, therefore, *Oscar Diaz* respectfully submits that this Court should grant this Petition for Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing was mailed *via* U.S. Mail, this 29th day of May, 2001, to: ***Solicitor General,*** Department of Justice, 10th and Constitution Avenue, N.W., Washington, D.C. 20530; and ***Madeline Shirley, Esq.,*** Assistant U. S. Attorney, 99 N.E. Fourth Street, Miami, Florida 33132.

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